General Guidelines for Administration of the FMLA in All Executive Branch Agencies, Boards and Commissions in NH State Government

These guidelines are not all-inclusive, and are intended as a general over-view of FMLA administration in NH State Government Executive Branch agencies, boards and commissions. Supervisors and managers are expected to notify their human resources and/or payroll office when an employee requests FMLA leave, or it appears that the employee will be absent for reasons outlined in the section below titled "How will you know an event is FMLA qualifying?" **Actual requests for certification of the need for leave, medical or other documentation that may be required, and correspondence directly related to the leave itself will be handled by the agency's human resources/payroll administrator or leave manager.** For additional information, contact the individual department's human resources office or the NH Division of Personnel. Useful information, federal regulations, and the complete text of the federal Family and Medical Leave Act as Amended can be found at http://www.dol.gov/whd/fmla/

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How will you know if an event is FMLA qualifying?

Determining whether or not leave actually qualifies as FMLA leave, or should be designated as FMLA leave, is usually a decision made by an agency's human resources staff. Supervisors and managers are responsible for notifying human resources and payroll if one of their employees MAY be requesting or taking leave for any reason covered by the Family and Medical Leave Act. Therefore, supervisors and managers must inform their human resources/payroll office whenever they believe an employee will need or has requested leave for any of the following reasons:

- The employee is absent or has requested leave due to the birth, adoption or foster care placement with the employee of a healthy child.
- The employee is absent or has requested leave as a result of an approved Workers Compensation Claim.
- The employee has been absent from work or incapacitated for more than 3 consecutive calendar days. (This includes an absence that extends from Friday through Monday, even though the employee was not working on Saturday or Sunday.)

- The employee is absent or has requested leave due to a known chronic condition such as asthma, heart disease, diabetes or epilepsy.
- The employee is absent or has requested leave as a result of a long-term or permanent condition such as a stroke or Alzheimer's disease.
- The employee is absent or has requested leave for repeated medical treatments such as chemotherapy or radiation treatment.
- The employee is absent or has requested leave to care for a spouse, a parent or a child who is seriously ill, or who is receiving treatment for a permanent, long-term or chronic medical condition.
- The employee is absent or has requested leave to care for an ill or injured servicemember.
- The employee is absent or has requested leave because the employee's spouse, mother, father or child has been called to active military duty in a foreign country.

Supervisors and managers who learn that an employee may need leave or may be taking leave for an FMLA-qualifying reason also should instruct that employee to contact human resources/payroll directly.

Eligibility

1. An employee is eligible for FMLA leave if:

    a. The employee has worked for the State (or has been maintained on the payroll) for at least 12 months or 52 weeks (not necessarily consecutively) before taking the leave, and,

    b. The employee has worked at least 1250 hours for the State during the 12 month period immediately prior to the date on which the leave will begin.

2. For employees who have been "rehired" by the State, if the break in service was less than 7 years, previous periods of employment with the State must be considered in calculating eligibility.

3. With the exception of military leave and time performing military service, time spent on leave, whether paid or unpaid, can not be included in the hours worked.

4. Regardless of the provisions of the Collective Bargaining Agreement for determining eligibility for overtime compensation, the principles established by the FLSA (Fair Labor Standards Act) determine the number of hours worked.

5. "On-call" hours are not considered "hours worked." However, overtime hours actually worked must be considered in determining whether or not an employee has worked the required 1250 hours.

Leave Entitlement

1. Regardless of the size of the agency, board or commission, the State of New Hampshire is considered a "covered employer" for purposes of eligibility for leave under the federal Family and Medical Leave Act of 1993, as Amended.

2. FMLA entitlements apply only to "active employees" who meet the eligibility requirements, and who have not already exhausted their entitlement to FMLA leave within the applicable 12 month period.

3. Eligible employees (whether full-time or part-time) are entitled to take up to 12 work weeks of job-protected leave during any 12-month period for one or more of the following reasons:

a. For the birth and care of the newborn child of the employee; or

b. For placement with the employee of a son or daughter for adoption or foster care; or

c. To care for an immediate family member (spouse, child or parent) with a serious health condition; or

d. To take medical leave when the employee is unable to perform the essential functions of the employee's position because of a serious health condition, or because the employee needs medical treatment for a serious health condition.

e. Because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is in any branch of the Armed Services deployed to a foreign country.

4. Spouses employed by the same employer are jointly entitled to a combined total of 12 work weeks of family leave in any 12 month period for the birth and care of their newborn child, for placement with the employee of a child (adoption or foster care), or to care for a parent who has a serious health condition. [For purposes of this policy, "same employer" means "same department or agency."]

5. Leave for the birth and care of a child, or placement of a child for adoption or foster care with the employee, must conclude within 12 months of the birth or placement. If an employee and his/her spouse use a combined total of 12 work weeks of family leave as set forth above, each individual employee is entitled to the remainder of the 12 weeks for his or her own medical care, or to care for a seriously ill family member. Leave may NOT be taken intermittently for bonding or care of a healthy child unless the employer agrees to allow the use of intermittent leave.

6. Since adoption of the FMLA and its implementation in New Hampshire State government, the State has used a "rolling 12 month period" measured backward from the date an employee uses FMLA leave to determine how much leave an eligible employee is entitled to take for each FMLA-qualifying event. Employees may take no more than 12 work weeks of FMLA leave during that 12 month period.

7. At any given time, the employee's entitlement to leave may change, and employees may fall in and out of the protection of the FMLA leave. Agencies must determine eligibility for leave with each new request for FMLA leave or military caregiver leave.

8. Eligible employees are entitled to job-protected military caregiver leave to care for a covered servicemember with a serious injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of the covered servicemember. Employees may take up to 26 weeks in a single 12 month period. For military caregiver leave, the applicable 12 month period is a "rolling 12 month period" measured forward from the date that leave begins.

9. FMLA may not exceed 12 weeks in a 12-month period. Combined military caregiver leave and FMLA leave may not exceed 26 weeks in any 12 month period.

Benefits During FMLA Approved Leave

1. <u>FMLA leave is job-protected leave</u>. An employee may not be disciplined or discriminated against in any way because the employee requests or takes approved FMLA leave. Approved FMLA absences may not be

considered in determining whether an employee has completed the quantity of work normally expected of employees who have not taken leave during the same period of time. Quality of work standards still apply.

2. During qualifying periods of FMLA leave, eligible employees are entitled to continue receiving employment benefits at the same level that the employee was receiving before the leave regardless of "pay status." Employees continue to be responsible for making any benefit payments they were making before the leave commenced.

3. Leave applies equally to male and female employees. Fathers and mothers who are eligible to take FMLA leave are each entitled to take family leave for the birth, adoption, or placement for foster care of a child. Certain restrictions apply if a husband and wife work for the same department or agency. Fathers and mothers who are eligible to take FMLA leave for the birth or adoption of a child may be entitled to use paid sick leave if permitted by the applicable Collective Bargaining Agreement, and if the leave is taken immediately following the birth or adoption. Sick leave may not be taken for foster-care placement.

4. In most cases, the employee is entitled to be restored to his or her position or an equivalent position at the conclusion of the leave. Unless medically unable to do so, if an employee fails to return to work from an approved, unpaid FMLA leave, the employee may be liable for repayment of any amounts that the State paid for the employee's benefits during the period of unpaid leave.

5. Employees are not entitled to accrue leave during an approved, unpaid FMLA absence. During such periods of unpaid approved FMLA leave, adjustments will be made to the employee's seniority date, increment date and leave accrual date, but it will not affect the employee's longevity date. When an employee is absent as a result of an approved Workers Compensation claim, any adjustments to the employee's increment date and leave accrual date will be made in conformance with Personnel Rules and Collective Bargaining Agreements in effect at that time.

Designating Leave as FMLA leave

1. The Family and Medical Leave Act allows employers to determine whether or not employees can be required to use accrued leave during an FMLA absence. Since its inception, it has been the policy of the State of New Hampshire to designate leave taken as FMLA leave when the employer has sufficient information to determine that the leave is FMLA qualifying, even if the employee does not request FMLA leave or objects to having the leave classified as FMLA leave. Administrators, managers and supervisors are NOT permitted to deviate from the policy, and must notify their human resources office when an employee requests FMLA leave, or when an employee's absence appears to be FMLA-qualifying.

2. After the fourth day of disability resulting from a workplace illness or injury, employees absent due to an approved Workers Compensation claim can not be required to use either sick leave or annual leave, although they may elect to supplement their Workers Compensation benefits by using accrued sick or annual leave. Such use of leave does not alter their entitlement to FMLA leave, nor does it reduce the amount of FMLA leave taken or designated. Employees who are absent due to a compensable workplace injury that also qualifies as a serious health condition should be advised in writing that the leave is being designated as FMLA medical leave. In all cases, FMLA leave runs concurrently with the Workers Compensation absence. If an employee is unable to return to his or her regular position, but is offered "light duty," the employee may choose to accept the assignment, but can not be required to return until his or her FMLA entitlement is exhausted. Employees who refuse light duty lose their eligibility for workers compensation payment.

3. Executive branch employees are required to use certain categories of available paid leave during approved FMLA absences as described in the chart below. Under the terms of the State's Collective Bargaining

Agreements, and as outlined in the Personnel Rules, employees who are absent due to their own non-work related illness or injury are required to use their accrued sick leave before they are allowed to use leave without pay, or some other form of paid leave. Under the provisions of the Fair Labor Standards Act, employers are permitted to require the use of accrued compensatory time instead of unpaid leave during periods of FMLA leave. (29 CFR 825.207)

Mandatory and Optional Use of Paid and Unpaid Leave During an Approved FMLA Event

The following chart indicates when employees will be required to substitute paid FMLA leave for unpaid FMLA leave. All required leave must be taken in the order that appears in the chart below (reading left to right) before unpaid leave or optional leave will be permitted. "Optional" means at the employee's discretion. The employer may not refuse to grant that leave if it is qualifying FMLA leave and the employee has used all available "required" leave during the FMLA entitlement period.

Reason for Leave	Sick Leave	Sick-D[1]	Sick-M[2]	Compensa-tory Time	Annual Leave	Bonus Leave	Floating Holiday[3]	Unpaid Leave
Employee's own serious health condition	Required	Not permitted	Not permitted	Required	Optional	Optional	Optional	Optional
Birth of a **healthy** child (mother)[4]	Required	Not permitted	Not permitted	Required	Optional	Optional	Optional	Optional
Adoption of a **healthy** child (mother)	Optional[5]	Not permitted	Not permitted	Required	Optional	Optional	Optional	Optional
Birth or adoption of a **healthy** child (father)	Optional[6]	Not permitted	Not permitted	Required	Optional	Optional	Optional	Optional
Foster Care Placement of a **healthy** child (mother or father)	Not permitted	Not permitted	Not permitted	Required	Optional	Optional	Optional	Optional
Serious health condition of a spouse, child or parent	Not permitted	Optional[7]	Required	Required	Optional	Optional	Optional	Optional
Military qualifying exigency	Not permitted	Not permitted	Not permitted	Required	Optional	Optional	Optional	Optional
Military caregiver leave[8]	Not permitted	Required	Required	Required	Optional	Optional	Optional	Optional

1 Sick-D may be taken by the mother in connection with the birth, adoption or foster care placement of a child for the child's scheduled medical appointments. Spouses may take Sick-D for medical appointments for the mother or child.
2 Sick-M, available in some collective bargaining units, may be taken in connection with the birth, adoption or foster care placement of a child if the child should become seriously ill or injured.
3 In all cases, floating holidays must be taken as full days.
4 Sick leave is required for the period of actual disability, and also may be permitted in certain collective bargaining units up to 12 weeks to the extent of the employee's FMLA leave entitlement it is taken immediately following the birth or adoption of the child. It is not permitted for foster care placements.
5 In some Collective Bargaining Agreements, sick leave may be permitted up to 12 weeks of approved FMLA leave if it is taken immediately following the adoption. Sick leave may not be taken for foster care placements.
6 In some Collective Bargaining Agreements, sick leave may be permitted up to 12 weeks of approved FMLA leave if it is taken immediately following the birth or adoption. Sick leave may not be taken for foster care placements.
7 Sick-D may be retained for dependent care, such as doctor's appointments, for family members who are not seriously ill or incapable of self-care within the meaning of the FMLA.
8 Unlike other FMLA leaves, the "single 12 month period" is not a rolling year looking backwards, but a 12 month period beginning on the date leave is first needed.

General Employer Notice Requirements

1. Each agency must conspicuously post either its own notice or the FMLA poster provided by the US Department of Labor in WHD Publication 1420 (revised February 2013) advising employees of their rights and benefits under the provisions of the Family and Medical Leave Act of 1993, as amended (FMLA).

2. When an employee requests FMLA leave, or when the employer learns that leave may be FMLA qualifying, the employer must provide notice, orally or in writing, within 5 business days, that the employee is or is not eligible for FMLA leave based on the employee's length of service, hours worked in the 12 months preceding the date leave is expected to begin, and FMLA leave used in the 12 months immediately preceding the date leave is expected to begin. If the employee is not eligible for FMLA leave, the employer must provide at least one reason explaining why the leave is not FMLA qualifying, or why the employee is not eligible for FMLA job-protected leave.

3. If an employee is found to be eligible for FMLA job-protected leave, the employer must provide a written Notice of Rights and Responsibilities outlining the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. At a minimum, the notice must explain:

    a. That the leave may be designated and counted against the employee's annual FMLA leave entitlement if qualifying and the applicable 12-month period for FMLA entitlement;
    b. Any requirements for the employee to furnish certification of a serious health condition, serious injury or illness, or qualifying exigency arising out of covered active duty or call to covered active duty status, and the consequences of failing to do so;
    c. The employee's right to substitute paid leave, whether the employer will require the substitution of paid leave, the conditions related to any substitution, and the employee's entitlement to take unpaid FMLA leave if the employee does not meet the conditions for paid leave;
    d. Any requirement for the employee to make any premium payments to maintain health benefits, the arrangements for making such payments, and the possible consequences of failure to make such payments on a timely basis (i.e. , the circumstances under which coverage may lapse);
    e. The employee's status as a "key employee" and the potential consequence that restoration may be denied following FMLA leave, explaining the conditions required for such denial (see §825.218);
    f. The employee's rights to maintenance of benefits during the FMLA leave and restoration to the same or an equivalent job upon return from FMLA leave and
    g. The employee's potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave (see §825.213).

4. The notice of rights and responsibilities may include other information, such as, whether the employer will require periodic reports of the employee's status and intent to return to work. The notice also may be accompanied by any required certification form.

5. If the specific information provided by the Notice Of Rights And Responsibilities changes, the employer shall, within five business days of receipt of the employee's first notice of need for leave subsequent to any change, provide written notice referencing the prior notice and setting forth any of the information in the notice of rights and responsibilities that has changed. For example, if the initial leave period was paid leave and the subsequent leave period would be unpaid leave, the employer may need to give notice of the arrangements for making premium payments.

Employee Notice Requirements and/or Requests for Leave

1. An employee must provide the employer at least 30 days advance notice before FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, planned medical treatment for a serious health condition of the employee or of a family member, or the planned medical treatment for a serious injury or illness of a covered servicemember.

2. If 30 days notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable. As soon as practicable means as soon as both possible and practical, taking into account all of the facts and circumstances in the individual case.

3. Employees also are required to abide by the employer's usual and customary requirements for requesting leave or reporting leave taken, absent unusual circumstances or more stringent requirements than those under the FMLA. Unusual circumstances could include employees being unable to call in to a specific number because no one answers that phone, or the voice mail box is full; or the employee might be unable to call in because of an emergency medical procedure in progress. If the employee fails to comply with the employer's usual notice and procedural requirements and there are no unusual circumstances to justify the failure to comply, FMLA job-protected leave may be delayed or denied.

4. When an employee becomes aware of a need for FMLA leave less than 30 days in advance, it should be practicable for the employee to provide notice of the need for leave either the same day or the next business day. In all cases, however, the determination of when an employee could practicably provide notice must take into account the individual facts and circumstances.

5. An employee's failure to provide timely notice, or a later failure to provide the required certification, can result in delay or denial of FMLA job-protection.

Certification of the Need for Leave

1. In order to obtain approval for an FMLA qualifying leave event, the employee must provide certification of the need for leave for any of the following:
    a. The employee's own serious health condition that makes the employee unable to perform one or more of the essential functions of the employee's position;
    b. The need to care for the employee's covered family member with a serious health condition;
    c. Because of a qualifying exigency or to care for a covered servicemember with a serious injury or illness.

2. An employer must give notice of a requirement for certification each time a certification is required; such notice must be written notice whenever required by 29 CFR §825.300(c). An employer's oral request to an employee to furnish any subsequent certification is sufficient.

3. When requested, an employee shall provide the requested certification within 15 calendar days of the date that such certification is requested. If the employee fails to provide the certification, if the certification is insufficient, or if the certification is incomplete, the employer must notify the employee in writing and allow 7 days in which the certification can be corrected or completed. Failure of an employee to provide certification as requested will result in denial or delay of FMLA job-protected leave, and may result in disciplinary action for failure to comply with the legitimate directive of a supervisor.

4. A human resources professional, leave administrator, management official or health care provider may need to contact the employee's health care provider for purposes of clarification and authentication of the medical certification (whether initial certification or recertification) after the employer has given the employee an opportunity to cure any deficiencies. Under no circumstances, however, may the employee's direct supervisor contact the employee's health care provider.

5. For purposes of administering the FMLA, "authentication" means providing the health care provider with a copy of the certification and requesting verification that the information contained on the certification form was completed and/or authorized by the health care provider who signed the document; no additional medical information may be requested. Employee consent it NOT required for the employer to obtain authentication of a medical certification.

6. For purposes of administering the FMLA, "clarification" means contacting the health care provider to understand the handwriting on the medical certification or to understand the meaning of a response. Employers may not ask health care providers for additional information beyond that required by the certification form. The employee must give permission for the employer to contact the medical provider for purposes of clarification.

7. The requirements of the Health Insurance Portability and Accountability Act ("HIPAA") Privacy Rule (see 45 CFR parts 160 and 164), which governs the privacy of individually-identifiable health information created or held by HIPAA-covered entities, must be satisfied when individually-identifiable health information of an employee is shared with an employer by a HIPAA-covered health care provider. If an employee chooses not to provide the employer with authorization allowing the employer to clarify the certification with the health care provider, and does not otherwise clarify the certification, the employer may deny the taking of FMLA leave if the certification is unclear. See §825.305(d). It is the employee's responsibility to provide the employer with a complete and sufficient certification and to clarify the certification if necessary.

8. An employer who has reason to doubt the validity of a medical certification may require the employee to obtain a second opinion, or in some cases, a third opinion, at the employer's expense. Pending receipt of the second (or third) medical opinion, the employee is provisionally entitled to the benefits of the Act, including maintenance of group health benefits. If the certifications do not ultimately establish the employee's entitlement to FMLA leave, the leave shall not be designated as FMLA leave and may be treated as paid or unpaid leave under the employer's established leave policies.

9. In the case of medical certification for the employee or family member, if an employee submits a complete and sufficient certification signed by the health care provider, the employer may not request additional information from the health care provider.

10. The employer is permitted to designate the health care provider to furnish the second opinion, but the selected health care provider may not be employed on a regular basis by the employer. The employer may not regularly contract with or otherwise regularly utilize the services of the health care provider furnishing the second opinion unless the employer is located in an area where access to health care is extremely limited (e.g. , a rural area where no more than one or two doctors practice in the relevant specialty in the vicinity).

Recertification of the Need for Leave

1. In most cases, an employer may request recertification no more often than every 30 days, and only in connection with an absence by the employee.

2. If the medical certification indicates that the minimum duration of the condition is more than 30 days, an employer must wait until that minimum duration expires before requesting a recertification unless:
    a. The employee requests an extension of leave;
    b. Circumstances described by the previous certification have changed significantly; or
    c. The employer receives information that casts doubt upon the employee's stated reason for the absence or the continuing validity of the certification

3. In all cases, the employer can request recertification annually for chronic or permanent conditions of the employee or the employee's family member for whom FMLA leave has been taken.

Intent to Return to Work

1. The employer may require periodic reports from an employee on approved FMLA leave to report on the employee's status and intent to return to work. The requirement for periodic reporting may not be discriminatory and must take into account all of the relevant facts and circumstances related to the individual employee's leave situation.

2. If an employee gives unequivocal notice of intent not to return to work (for instance – resignation, retirement) the employer's obligations under FMLA to maintain health benefits (subject to COBRA requirements) and to restore the employee cease.

3. From time to time, an employee on approved FMLA leave may need more leave than originally expected. The employee must provide complete and sufficient notice of the need for additional leave, and must comply with the employer's requirements for requesting leave. FMLA job-protected leave is strictly limited to 12 work weeks within the applicable 12 month period.

4. Although an employee has exhausted his or her entitlement to 12 work weeks of job protected leave during the applicable 12 month period, the employee may be entitled to additional leave for a bona fide disability under the provisions of the ADA, or the employee may be eligible for additional leave under the provisions of State law or an effective Collective Bargaining Agreement.

5. Employees may not remain on FMLA leave if the need for leave no longer exists.

6. If circumstances change and an employee needs less leave than originally anticipated, the employer may not require the employee to take more than the amount of FMLA leave required. The employee must provide reasonable notice, usually within 2 business days, of the change.

Restoration to Position and Fitness for Duty

1. The employer may require the employee to provide a fitness for duty certification before the employee will be restored to the same or similar position under the following conditions:
    a. The leave was a result of the employee's own serious health condition that made the employee unable to perform the employee's job; or
    b. The employer has a uniformly-applied policy or practice that requires all similarly-situated employees (i.e. , same occupation, same serious health condition) who take leave for such conditions to obtain and present certification from the employee's health care provider that the employee is able to resume work.

2. The employee has the same obligations to participate and cooperate (including providing a complete and sufficient certification or providing sufficient authorization to the health care provider to provide the information directly to the employer) in the fitness-for-duty certification process as in the initial certification process.

3. If an employer requires certifications of an employee's fitness for duty to return to work, as permitted by the FMLA under a uniform policy, it must comply with the ADA requirement that a fitness for duty physical be job-related and consistent with business necessity.

4. At the conclusion of an employee's approved FMLA leave, the employee must be restored to the same or an equivalent position if the position is available (i.e., has not been discontinued as a result of layoff or reduction in force) and the employee is fit for duty. If an employee is medically unable to return to work at the conclusion of an approved FMLA leave taken for the employee's own serious health condition, the employer should evaluate whether or not that condition should be classified as a disability. If so, that employee may be entitled to a reasonable accommodation that does not create an undue hardship for the employer.

Definitions

1. Spouse means a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized.

2. Parent means a biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the employee when the employee was a son or daughter as defined below. This term does not include parents "in-law." The FMLA military leave provisions have a specific definition of parent for purposes of servicemember caregiver leave.

3. For purposes of FMLA leave taken for birth or adoption, or to care for a family member with a serious health condition, son or daughter means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under age 18, or age 18 or older and "incapable of self-care because of a mental or physical disability" at the time that FMLA leave is to commence.

4. A serious health condition that makes the employee unable to perform the functions of the employee's job and entitled to FMLA leave means an illness, injury, impairment or physical or mental condition that involves inpatient or continuing treatment by a health care provider as defined below.
    a. Incapacity means inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom.
    b. The term treatment includes (but is not limited to) examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations.
    c. A regimen of continuing treatment includes, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (e.g., oxygen). A regimen of continuing treatment that includes the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave.

5. Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not "serious health conditions" unless inpatient hospital care is required or unless complications develop. Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor

ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave.

6. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of the regulation are met.

7. Mental illness or allergies may be serious health conditions, but only if all the conditions of this section are met.

8. Inpatient care means an overnight stay in a hospital, hospice, or residential medical care facility, including any period of incapacity as defined above, or any subsequent treatment in connection with such inpatient care.

9. A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

    a. Incapacity and treatment. A period of incapacity of more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:
        i. Treatment two or more times, within 30 days of the first day of incapacity, unless extenuating circumstances exist, by a health care provider, by a nurse under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or
        ii. Treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment under the supervision of the health care provider.
    b. The above requirement for treatment by a health care provider means an in-person visit to a health care provider. The first (or only) in-person treatment visit must take place within seven days of the first day of incapacity. Whether additional treatment visits or a regimen of continuing treatment is necessary within the 30-day period shall be determined by the health care provider.
    c. The term "extenuating circumstances" above means circumstances beyond the employee's control that prevent the follow-up visit from occurring as planned by the health care provider. Whether a given set of circumstances are extenuating depends on the facts. For example, extenuating circumstances exist if a health care provider determines that a second in-person visit is needed within the 30-day period, but the health care provider does not have any available appointments during that time period.

10. Pregnancy or prenatal care. Any period of incapacity due to pregnancy, or for prenatal care.

11. Chronic conditions. Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

    a. Requires periodic visits (defined as at least twice a year) for treatment by a health care provider, or by a nurse under direct supervision of a health care provider;
    b. Continues over an extended period of time (including recurring episodes of a single underlying condition); and
    c. May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

12. Permanent or long-term conditions. A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

13. Conditions requiring multiple treatments. Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, for:

    a. Restorative surgery after an accident or other injury; or
    b. A condition that would likely result in a period of incapacity of more than three consecutive, full calendar days in the absence of medical intervention or treatment, such as cancer chemotherapy, radiation, etc.), severe arthritis (physical therapy), or kidney disease (dialysis).
    c. Absences attributable to incapacity under this section qualify for FMLA leave even though the employee or the covered family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three consecutive, full calendar days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.

14. Substance abuse may be a serious health condition if the conditions of Sec. 825.113 through 825.115 of the Code of Federal Regulations are met. However, FMLA leave may only be taken for treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider.
    a. Absence because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave. Treatment for substance abuse does not prevent an employer from taking employment action against an employee.
    b. The employer may not take action against the employee because the employee has exercised his or her right to take FMLA leave for treatment. However, if the employer has an established policy, applied in a non-discriminatory manner that has been communicated to all employees, that provides under certain circumstances an employee may be terminated for substance abuse, pursuant to that policy the employee may be terminated whether or not the employee is presently taking FMLA leave.

15. An employee may also take FMLA leave to care for a covered family member who is receiving treatment for substance abuse. The employer may not take action against an employee who is providing care for a covered family member receiving treatment for substance abuse.

16. Because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is in any branch of the Armed Services deployed to a foreign country. Qualifying exigency includes:

    a. Issues arising from a covered military member's short notice deployment (i.e., deployment on seven or less days of notice) for a period of seven days from the date of notification;
    b. Military events and related activities, such as official ceremonies, programs, or events sponsored by the military or family support or assistance programs and informational briefings sponsored or promoted by the military, military service organizations, or the American Red Cross that are related to the active duty or call to active duty status of a covered military member;
    c. Certain childcare and related activities arising from the active duty or call to active duty status of a covered military member, such as arranging for alternative childcare, providing childcare on a non-routine, urgent, immediate need basis, enrolling or transferring a child in a new school or day care

facility, and attending certain meetings at a school or a day care facility if they are necessary due to circumstances arising from the active duty or call to active duty of the covered military member;

d. Making or updating financial and legal arrangements to address a covered military member's absence;
e. Attending counseling provided by someone other than a health care provider for oneself, the covered military member, or the child of the covered military member, the need for which arises from the active duty or call to active duty status of the covered military member;
f. Taking up to five days of leave to spend time with a covered military member who is on short-term temporary, rest and recuperation leave during deployment;
g. Attending to certain post-deployment activities, including attending arrival ceremonies, reintegration briefings and events, and other official ceremonies or programs sponsored by the military for a period of 90 days following the termination of the covered military member's active duty status, and addressing issues arising from the death of a covered military member;
h. Any other event that the employee and employer agree is a qualifying exigency.

17. To care for a covered servicemember with a serious injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of the covered servicemember.
    a. Covered service member means a member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness; or
    b. Veterans who are undergoing medical treatment, recuperation, or therapy for a serious injury or illness and who were a member of the Armed Forces (including National Guard and Reserves) during the five (5) year period preceding the date of the treatment, therapy, or recuperation. This includes active duty military personnel and veterans for up to 5 years after the veteran leaves service.
    c. Serious injury or illness related to military caregiver leave includes any illness/injuries that existed before a service member's active duty but which were aggravated by service in the line of duty on active duty in the Armed Forces.